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DILER DEMIR CELIK ENDUSTRU VE TICARET AS v. MENTERI KEWANGAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
NOORIN BADARUDDIN J
[JUDICIAL REVIEW NO: WA-25-93-02-2020]
5 MAY 2022

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Abstract – *The legal duty to carry out an anti-dumping investigation is cast on the Ministry of International Trade and Industry ('MITI') alone. Even if, on the surface, MITI seems to be a judge on its own cause, the validity of the decision could not be challenged merely on this ground alone. The anti-dumping duties in this case were imposed after an objective investigation had been undertaken and there was nothing before the court to show that the decision was swayed by any influence.*

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ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application for – Imposition of anti-dumping duties at rate of 3.62% on steel reinforcing bar products – Application by Turkish company to quash decision – Whether there was breach of natural justice – Whether there was real danger of bias – Whether decision ultra vires, illegal, irrational and unreasonable – Whether there were calculation errors in regard to anti-dumping duties – Whether investigation authority's findings on injury and causal link supported or justified decision reached – Countervailing and Anti-Dumping Duties Act 1993*

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The applicant was a company incorporated in the Republic of Turkey and used its related trading company to export steel reinforcing bar ('rebar') to Malaysia. In this application, the applicant sought a *certiorari* order to quash: (i) the first respondent's decision to impose anti-dumping duties at the rate of 3.62% on steel concrete rebar products originating from the applicant in the Republic of Turkey from 22 January 2020 to 21 January 2025, as set out in the Customs (Anti-Dumping Duties) Order 2020 [P.U.(A) 22 dated 21 January 2020] ('CADD') ('first impugned decision'); and (ii) the second respondent's decision and/or recommendation to impose anti-dumping duties at the rate of 3.62% on steel concrete rebar products originating or exported from the applicant in the Republic of Turkey, as set out in the Notice of Affirmative Final Determination [P.U.[B] 46 dated 21 January 2020] ('NAFD') and the Final Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020, respectively ('second impugned decision'). The events that led to the filing of this application were as the following. The Malaysian Steel Association ('MSA'), the fifth respondent, filed both a confidential and non-confidential anti-dumping petition ('petition') on behalf of petitioning producers, to the second respondent for

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the initiation of anti-dumping investigation on the imports of rebar originating or exported from Singapore and Turkey. By a notice of initiation, the Minister of International Trade and Industry, the second respondent, initiated the anti-dumping investigations on imports of rebar originating from the said countries. Following a preliminary determination report ('PDR'), a provisional anti-dumping duty of 3.35% was imposed on rebar originating or exported from the applicant for 120 days from 23 September 2019. The applicant filed its comments on the PDR. The investigation authority ('IA') (i) conducted a verification visit at the applicant's premises in Turkey and verified all the information by the applicant; (ii) released its final disclosure in the form of notice of essential facts; and (iii) recommended a final anti-dumping duty of 3.62% on rebar originating or exported from the applicant. *Via* the NAFD, the second respondent made an affirmative final determination in respect of anti-dumping duties and proposed to the first respondent to impose a final anti-dumping duty of 3.62% on the rebar imports originating from the applicant. The fourth defendant would enforce and collect the said anti-dumping duties through the Director General of Customs, the third respondent. Dissatisfied with the above decision, the applicant filed this judicial review application. The crux of the applicant's contentions were: (i) the first respondent was acting under the dictation of the Government of Malaysia, the fourth respondent; (ii) there was breach of natural justice as there was a real danger of bias on the part of the respondents, especially the second respondent in that the respondents could have very likely regarded the fifth respondent's petition in favour; (iii) the decision was *ultra vires*, illegal and unreasonable as there were calculation errors in regard to the anti-dumping duty; and (iv) the decision was irrational and unreasonable as the IA's findings on injury and causal link did not support or justify the decision reached.

Held (dismissing application with costs):

(1) The CADD was an instrument issued by the first respondent for the purpose of collecting the anti-dumping duties and for enforcing the decision made by the fourth respondent and published in the NAFD, pursuant to s. 25(1) and (4) of the Countervailing and Anti-Dumping Duties Act 1993 ('Act'). As such, the actions by the second respondent in signing the NAFD and the first respondent in signing the CADD were administrative actions for purposes of implementing the decision of the fourth respondent in imposing the anti-dumping duties. There was no procedural irregularity in regard to the issuance of the NAFD and there was no abdication of responsibility by the first respondent. (para 30)

(2) The legal duty to carry out an anti-dumping investigation is cast on MITI alone. Hence, even if on the surface it looks as though MITI seems to be a judge on its own cause, the validity of the decision could not be challenged merely on this ground alone. Further, the facts and

circumstances of the case did not support the applicant's contention that there was a real danger of bias as the respondents had consistently maintained that they were unaware of MSI's involvement in the preparation of the petition. MSI was never mentioned in the petition and there was nothing in the petition which indicated MSI's involvement. In addition, the fifth respondent represented itself during the entire anti-dumping investigation and MSI was never involved. It was clear that there was no averment that a representative from the first respondent sat in the MSI's Board of Directors and none of the MSI's Board of Directors was involved in the investigation process. Having regard to the circumstances, it could not be gainsaid that there was a real danger of bias on the part of the IA, the first and second respondents in exercising their functions under the Act. The court could not act on possibility or probability. Even where inference could be made, the inference must be based on evidence. The anti-dumping duties were imposed after an objective investigation had been undertaken by the respondents and there was nothing before the court to show that the decision was made on the fifth respondent's petition alone or that the first respondent was influenced by any party. (paras 35, 36 & 40)

(3) The IA had acted in accordance with s. 17(1) of the Act in identifying the export price. The sales transaction between the applicant and the DDT was substantiated with invoices as proof of sales, thereby satisfying the IA that the export price on the sales transaction between the applicant to DDT was reliable. Hence, the application of s. 17(2) of the Act was precluded. It could be clearly understood that export price need not be constructed in light of the invoices between the applicant to DDT. Whilst s. 17 of the Act requires the export price shall be the price actually paid for or payable for the subject merchandise, it must be read together with s. 18 of the Act. This essentially means the normal value and the export price that had been identified by the IA must be compared fairly with each other. (paras 60 & 61)

(4) The IA had determined the applicant as the producer/exporter of the product concerned and was satisfied that the information provided by the applicant on its sales transaction to DDT was reliable to be used as export price. Since the IA had correctly selected the sales transaction between the applicant to DDT to arrive at the export price, there was no issue with respect to refusal to use the contract date as a basis to determine the export price as there were no contracts entered between the applicant and DDT since there were only invoices between the applicant and DDT. The applicant's contention that there was a domino effect due to the alleged error by the IA in selecting the preliminary data pool to determine the export price was a non-starter. (paras 63, 64 & 65)

(5) There could not be any irrationality in the injury and causal link analysis done by the IA. The respondents had divulged that during the anti-dumping investigation, the IA's findings on injury and causal link were not challenged by the applicant and was only raised by the Minister of Trade, Republic of Turkey, the TSEA and other companies. No application was made to the court by any of these companies to review the findings of the injury. As such, the applicant could not, by way of judicial review application, raise this issue of injury and causal link findings which they did not address during the anti-dumping investigation. (paras 75 & 76)

(6) There was nothing irrational or illegal in the decision of the respondents. When all process taken in the decision-making was in accordance with law, it did not warrant interference of the court. (para 86)

Case(s) referred to:

BX Steel POSCO Cold Rolled Sheet Co Ltd v. Minister Of Finance & Ors; FIW Steel Sdn Bhd (Intervener) [2020] 1 LNS 587 HC ***(refd)***

Hannam v. Bradford City Council [1970] 1 WLR 937 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2021] 2 CLJ 808 CA ***(dist)***

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar [2020] 1 CLJ 1 FC ***(refd)***

Legislation referred to:

Countervailing and Anti-Dumping Duties Act 1993, ss. 2, 17(1), (2), (3), 18, 25(1), (2), (4), 30(3), (4), (5)

Countervailing and Anti-Dumping Duties Regulations 1994, regs. 20, 21

Customs Act 1967, s. 11(1)

Interpretation Acts 1948 and 1967, ss. 40, 93, 95

Rules of Court 2012, O. 53 r. 3(1), (2)

For the applicant - Jason Teoh, Khong Siong Sie & Ashlyn Lau Hui Qi; M/s Jason Teoh & Partners

For the 1st-4th respondents - Kogilambigai Muthusamy; FC

For the 5th respondent - Jason Tan Jia Xin & Steward Lee Wai Foong; M/s Lee Hishammuddin Allen & Gledhill

Reported by Lina E

JUDGMENT

Noorin Badaruddin J:

[1] The applicant was granted leave to file this judicial review application under O. 53 r. 3(1) of the Rules of Court 2012 ("ROC") to seek for a *certiorari* order to quash the followings:

(i) the first respondent's decision to impose anti-dumping duties at the rate of 3.62% on steel concrete reinforcing bar products originating or exported from the applicant in the Republic of Turkey from 22 January 2020 to 21 January 2025 as set out in the Customs (Anti-Dumping Duties) Order 2020 [P.U.(A) 22 dated 21 January 2020] (the "first impugned decision"); and

(ii) the second respondent's decision and/or recommendation to impose anti-dumping duties at the rate of 3.62% on steel concrete reinforcing bar products originating or exported from the applicant in the Republic of Turkey as set out in the Notice of Affirmative Final Determination [P.U.(B) 46 dated 21 January 2020] and the Final Determination Report of an Anti-Dumping Duty Investigation dated 7 January 2020 respectively (the "second impugned decision").

Background Facts

[2] The applicant, DDC is a company incorporated in the Republic of Turkey with its registered address at Tersane Cad. Diler Han No. 96 Karakoy Istanbul, Turkey. The applicant uses Diler Dis Ticaret Anomin Sirketi ("DDT"), its related trading company to export its steel reinforcing bar ("rebar") to Malaysia.

[3] On 29 March 2019, the fifth respondent, MSA filed both a confidential and non-confidential anti-dumping petition ("AD petition/ petition") on behalf of:

(i) Malaysia Steel Works (KL) Bhd;

(ii) Amsteel Mills Sdn Bhd;

(iii) Antara Steel Mills Sdn Bhd; and

(iv) Established Metal Industries Sdn Bhd.

("petitioning producers"), to the second respondent for the initiation of an anti-dumping investigation on the imports of the rebar originating or exported from Singapore and Turkey.

[4] On 26 April 2019, by a notice of initiation published in the Federal Government *Gazette* No. P.U.(B) 211, the second respondent/MITI Minister initiated the anti-dumping investigation on imports of rebar originating or exported from Singapore and Turkey under the relevant provisions of the Countervailing and Anti-Dumping Duties Act 1993 ("Act 504"), Countervailing and Anti-Dumping Duties Regulations 1994 and agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 set out in Annex 1A of the World Trade Organization ("WTO") Agreement ("the investigation").

[5] Following a Preliminary Determination Report dated 5 September 2019, by:

(i) a Notice of Affirmative Preliminary Determination No. P.U. (B) 454 signed on 19 September 2019 and published in the Federal Government *Gazette* on 23 September 2019; and

(ii) Customs (Provisional Anti-Dumping Duties) Order 2019 P.U.(A) 265 signed on 20 September 2019 and published in the Federal Government *Gazette* on 23 September 2019 a provisional anti-dumping duty of 3.35% was imposed on rebar originating or exported from the applicant for 120 days from 23 September 2019.

[6] On 4 October 2019, the applicant filed its Comments on the Preliminary Determination Report to comment on the investigation authority's ("IA") *ie*, the Trade Practices Section of the Ministry of International Trade and Industry ("MITI") alleging flawed and *ultra vires* calculation methodology and urged the respondents to reconsider their affirmative preliminary determination.

[7] Together with other Turkish companies, the applicant also submitted its comments on Preliminary Determination Report dated 4 October 2019 to the IA through the Turkish Steel Exporters Association ("TSEA") where it was emphasised that the facts do not support the IA's finding that the alleged dumping caused injury to the petitioning producers.

[8] From 14 October 2019 to 17 October 2019, the IA conducted a verification visit at the applicant's premises in Turkey and duly verified all the information submitted by the applicant in the foreign producer's/ exporter's questionnaire.

[9] On 23 December 2019, the IA released its final disclosure in the form of a notice of essential facts. The IA insisted to maintain its dumping margin calculation methodology and findings on the injury. It recommended a final anti-dumping duty of 3.62% on rebar originating or exported from the applicant.

[10] *Via* a Notice of Affirmative Final Determination as published in the Government *Gazette* P.U.(B) on 15 January 2020, the second respondent made an affirmative final determination in respect of anti-dumping duties and proposed to the first respondent to impose a final anti-dumping duty of 3.62% on the rebar imports originating from the applicant.

[11] The fourth respondent will enforce and collect the said anti-dumping duties through the third respondent ("DG customs").

[12] Dissatisfied with the above decision, the applicant filed this judicial review application.

A **Summary Of The Applicant's Contentions**

[13] The crux of the applicant's contentions are as follows:

(i) the first respondent was acting under the dictation of the Government of Malaysia, the fourth respondent;

B (ii) breach of natural justice: a real danger of bias on the part of the respondents, especially the second respondent in that the respondents could have very likely regarded the fifth respondent's petition in favour;

(iii) *ultra vires*, illegal and unreasonable decision as there were calculation errors in regard to the anti-dumping duty; and

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(iv) irrational and unreasonable decision as the IA's findings on injury and causal link do not support or justify the decision reached.

Findings

D **[14]** The matter herein relates very much to the anti-dumping investigation conducted by the IA. Basically, there are three main features involved in the anti-dumping investigation:

(i) that there must be a proper procedure to be followed in the calculation of the dumping margin;

E (ii) there must be an analysis whether the domestic industry has suffered injury; and

(iii) there must be a causation between the dumping margin and the injury suffered by the domestic industry.

F *The First Issue: The First Respondent Was Acting Under The Dictation Of The Fourth Respondent, The Government Of Malaysia*

[15] The applicant contends that the first respondent has abdicated his statutory duty under s. 30 of Act 504 to decide or determine on the imposition of the anti-dumping duties in all the investigations initiated in G Malaysia. Instead, what the first respondent is alleged to have done is merely to act under the dictation of the fourth respondent when it should be the first respondent and the first respondent alone who has the power and authority to decide on the imposition of the anti-dumping duties in Malaysia.

H **[16]** In support of their contention, the applicant first highlighted the chronological order in which the Notice of Affirmative Final Decision was signed by the second respondent and the Customs (Anti-Dumping Duties) Order 2020 was signed by the first respondent.

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Date	Event
15 January 2020	Minister of MITI (the second respondent) signed the notice of affirmative final determination which states that the fourth respondent has made a final determination in relation to the anti-dumping investigation.
16 January 2020	Minister of Finance (the first respondent) signed the Customs (Anti-Dumping Duties) Order 2020 which provides for anti-dumping duties to be levied on the PUI exported from, amongst others, the applicant.

[17] Premised on the chronology of events illustrated in the above, the applicant argues that as the Customs (Anti-Dumping Duties) Order 2020 was signed by the first respondent one day after the Notice of Affirmative Final Determination, the first respondent has abdicated his responsibility to the fourth respondent and acted under the latter's dictation. The applicant argues that since the second respondent signed the Notice of Affirmative Final Determination, it goes to show that the second respondent for all intents and purposes was the one who made the final determination which the applicant says is evidence of procedural impropriety. According to the applicant, under ss. 40, 93 and 95 of the Interpretation Acts 1948 and 1967, only a person specifically conferred with the power by any written law can exercise such power to give effect to/enforce the said written law.

[18] The applicant further argued that the first to the fourth respondents had in fact unequivocally admitted that it was the fourth respondent that made the decision to impose the anti-dumping duties and not the first respondent as the first respondent was just administratively carrying out the decision made by the fourth respondent and then issued the Customs (Anti-Dumping Duties) Order 2020. It is contended that such a position taken by the first to the fourth respondents is wrong in law. In support of their contention the applicant relies on *MP Jain Administrative Law of Malaysia* co-authored by Dato Sri Hishamudin Yunus and three others at pp. 480 and 471 of the authoritative textbook which state as follows:

> **Acting under dictation**
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> *Discretionary power must be exercised by the very authority whom the discretion is conferred by the law in question. A situation of non-application of its discretion by an authority arises when it does not consider the matter itself, but acts under dictation from, or at the behest of, a superior officer. In law, this amounts to non-exercise of its discretion by the concerned authority, and, consequently, the action taken by it is invalid.* Although, *prima facie*, the authority purports to act in the matter itself, yet, in effect, it is not so because it has not taken the decision in question in its own judgment as contemplated

by the statute in question. *If power to grant licences is conferred on an official, and he grants a licence to a person, but later cancels it at the direction of the government, the cancellation of the licence will be bad. Under the law, the discretion was vested in the official himself but he did not apply his own mind to the matter of cancellation; he just acted at the behest of the government; he thus acted as nothing more than a mere transmitting agent of the government's order. Administrative Law does not permit this sort of thing.*[376] *The administrator, in whom the law confides the discretion, must function himself and exercise his power according to his own judgment and wisdom without any interference or dictation from any higher officer. If he does not act himself then he abdicates his responsibility.* A senior officer

the dictates of superior officers who had no statutory power to issue such a dictate. *The court emphasised that the detaining authority must make the order on his own 'personal bona fide satisfaction' and not on the dictates of anyone else or under the influence of anybody else.*[379] (emphasis added)

This principle operates fully in Malaysia. The matter was considered by the

[19] On this issue, it is of the considered view that the applicant's contention is misplaced. Firstly, s. 30 comes under Part IV of Act 504 under the chapter "Administration" which provides:

30(1) Any petition to be submitted under Parts II and III shall be submitted to the Minister.

(2) Subject to the provisions of this Act, any action to be conducted or taken by any person or officer authorized in writing in that behalf by the Minister.

(3) Any finding of an investigation, whether for the purpose of a preliminary or final determination, or a review, under this Act, shall be forwarded to the Minister.

(4) The Minister shall make a recommendation to the Minister of Finance who shall make a determination or a decision.

(5) The collection of any countervailing or anti-dumping duty imposed under this Act shall be conducted by an officer of customs.

(6) If any questions arise as to whether a particular product is or is not included in any notification given under this Act, such question shall be referred to the Minister who shall make a decision on the matter.

[20] It is clear from the above provision that any finding of an investigation for the purpose of a preliminary or final determination shall be forwarded to the Minister of MITI (sub-s. 30(3) of Act 504), the second respondent. Therefore, the IA's investigation is an administrative process undertaken to enable a determination to be made. The IA therefore does not make a decision. The second respondent then shall make recommendation to the first respondent as the Minister of Finance (sub-s. 30(4) of Act 504). The first respondent then shall make a determination or a decision (sub-s. 30(4) of Act 504) in regard to the recommendation made by the second respondent.

[21] Section 30 of Act 504 cannot be read in isolation. A statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. The provision of one section cannot be used to defeat the provision contained in another (see Federal Court's judgment in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Muziadi Mukhtar* [2020] 1 CLJ 1). Whilst s. 30 of Act 504 is couched in general terms in the sense that the first respondent is to determine the recommendation made by the second respondent, there is s. 25 of Act 504 which specifically states that it is the Government who shall make a final determination and impose anti-dumping duties. Section 2 of Act 504 defines Government as the Government of Malaysia, the fourth respondent herein. Section 25 of Act 504 is reproduced:

> Final determination of dumping and injury
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> 25(1) The Government shall, within such period as may be prescribed, make a final determination regarding:
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> (a) whether a dumping margin exists with regard to the subject merchandise and the margin of such dumping; and
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> (b) whether injury is found to exist in any one of the following ways:
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> (i) the subject merchandise, through the effects of dumping, is causing material injury to the domestic industry in Malaysia producing the like product;
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> (ii) the subject merchandise, through the effects of dumping, is threatening to cause material injury to the domestic industry in Malaysia producing the like product; or
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> (iii) the subject merchandise, through the effects of dumping, is causing material retardation of the establishment of such an industry in Malaysia.
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> (2) The Government shall, before making a final determination, inform all interested parties of the essential facts under consideration that form the basis for the decision whether to apply definitive measures.
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> (2A) A disclosure under subsection (2) shall be made in sufficient time for ail interested parties to defend their interests.
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> (3) Where the Government makes a negative final determination with regard to subsection (1), it shall:
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> (a) terminate the investigation;
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> (b) terminate the provisional measures applied under section 24, and release the security required by such measures; and
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> (c) publish a notice of the negative final determination, stating the reasons for its negative determination.

(4) Where the Government makes an affirmative final determination with regard to subsection (1), it shall:

(a) publish a notice of affirmative final determination stating the reasons for its affirmative determination, the anti-dumping duties applicable and the subject merchandise on which the anti-dumping duties apply;

(b) impose anti-dumping duties in the amounts determined in accordance with subsection 15(2) on the subject merchandise imported into Malaysia on or after the date of publication of the final determination; and

(c) impose anti-dumping duties in accordance with subsections (5) and (6) on imports into Malaysia for which provisional measures were applied.

(4A) Where an affirmative final determination has been made, the Government may take into consideration public interest in determining whether to impose anti-dumping duties and the amount of such duties.

(5) The Government shall impose anti-dumping duties on the subject merchandise against which provisional measures were applied where:

(a) the Government makes a determination of material injury under subparagraph (1)(b)(i); or

(b) the Government makes a determination of threat of material injury under subparagraph (1)(b)(ii), it finds that the subject merchandise, in the absence of the provisional measures, would have led to a finding of material injury under subparagraph (1)(b)(i).

(5A) Notwithstanding subsection (5), where a determination of threat of injury or material retardation is made but no injury has occurred, a definitive anti-dumping duty may be imposed only from the date of the determination of the existence of a threat of injury or material retardation, and any security submitted during the period of the application of provisional measures shall be released immediately.

(6) With respect to the imposition of anti-dumping duties under subsection (5):

(a) where the anti-dumping duty is higher than the amount guaranteed by the security required under the provisional measures, only the amount equal to the security shall be imposed; and

(b) where the anti-dumping duty is less than the amount guaranteed by the security required under the provisional measures, the full amount of the anti-dumping duty shall be imposed and the excess amount of the security shall be reimbursed or released.

(7) Notwithstanding subsections (4) and (5), the Government may impose anti-dumping duties on the subject merchandise imported into Malaysia within a period of ninety days prior to the application of provisional measures if:

(a) the Government finds injury that is difficult to repair;

(b) such injury is being caused by massive imports of the subject merchandise in a short period of time; and

(c) there is a history of dumping which caused injury, or the importer was or should have been aware that the exporter practises dumping and that such dumping would cause injury.

(7A) No anti-dumping duties shall be imposed retroactively under subsection (7) on merchandise entered for consumption before the date of initiation of the investigation.

(8) When an anti-dumping duty is imposed on the subject merchandise, such anti-dumping duty shall be imposed in the appropriate amount in each case on a non-discriminatory basis on all imports of such merchandise into Malaysia from the country found to be dumping the subject merchandise causing injury.

(9) Provisional measures and definitive anti-dumping duties shall only be applied to subject merchandise that enters for consumption after the time when the decision under subsection 24(1) or 25(4), as the case may be, enters into force.

[22] It is therefore clear that it is the fourth respondent who is vested with the power and authority to make a final determination and impose anti-dumping duties and not the first respondent. Under Act 504, the determination by the first respondent relates to the recommendation made by the second respondent after the investigation has been completed but it is the fourth respondent who makes the decision to impose anti-dumping duties as reflected in the Notice of Affirmative Final Determination.

[23] Looking back at the applicant's application specifically to the statement pursuant to O. 53 r. 3(2) of the ROC, the applicant had in fact stated that it is the first respondent who had decided to impose the anti-dumping duties at the rate of 3.62% on the rebar. The applicant's statement is reproduced:

2. *The 1st Respondent is the Minister of Finance ("Minister of Finance") who decided to impose anti-dumping duties at the rate of 3.62% on Steel Concrete Reinforcing Bar Products originating or exported from DDC of the Republic Of Turkey* from 22 January 2020 to 21 January 2025 ("Anti-dumping Duties") as set out under:

(a) Notice of Affirmative Final Determination No. P.U. (B) 46 and the Final Determination Report of an Anti-Dumping Duty Investigation with regard the imports of Steel Concrete Reinforcing Bar Products originating or exported from the Republic Of Singapore and the Republic Of Turkey dated 21 January 2020 and 7 January 2020 respectively; and

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(b) Customs (Anti-Dumping Duties) Order 2020 P.U. (A) 22 dated 21 January 2020 following the recommendation or proposal of the Minister of International Trade & Industry arising from an Anti-Dumping Duty Investigation with regard to the imports of Steel Concrete Reinforcing Bar Products originating or exported from the Republic Of Singapore and the Republic Of Turkey. ("MOF Decision"). (emphasis added)

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[24] It is therefore perplexing when at this stage, the applicant is now saying that the first respondent has abdicated his responsibility under s. 30 of Act 504 when the applicant has identified that it is the first respondent who made the decision. Notwithstanding the perplexing stance taken, this court finds that the applicant's contention is a misconception of law as it has failed to appreciate the operation of ss. 30 and 25 of Act 504.

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[25] It is imperative to note that s. 30(5) of Act 504 provides that the collection of any countervailing or anti-dumping duty imposed under the same Act shall be conducted by any officer of customs. Section 11(1) of the Customs Act 1967 ("Act 235") states:

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Power of Minister to fix customs duties by orders to be approved by the Dewan Rakyat

11(1) The Minister may, from time to time, by order published in the *Gazette*, fix the customs duties to be levied on any goods imported into or exported from Malaysia and to be paid by the importer or exporter, as the case may be.

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[26] Customs duty is defined in s. 2 of Act 235 to mean:

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"customs duty" means any import duty, export duty, surtax, surcharge or cess imposed by or under this Act, any countervailing duty or anti-dumping duty imposed by or under the Countervailing and Anti-Dumping Duties Act 1993 [Act 504], any safeguard duty imposed by or under the Safeguards Act 2006 [Act 657] and includes any royalty payable *in lieu* of an export duty under any written law, or a contract, lease or agreement to which the Federal Government or the Government of any State is a party or to which such Government has consented.

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[27] Corollary to the above provision, we have the Hansard which recorded the Parliamentary Debates in the House of Representatives during the 8th Parliament, 3rd Session on 20 May 1993 where during the second reading of the Countervailing and Anti-Dumping Bill, it was stated that the countervailing and anti-dumping duties that will be imposed is the customs duty that can only be collected through an order or customs notice under Act 235. In the same Parliamentary Debates, it was made clear that Act 504 is to be managed by MITI and the Ministry of Finance is tasked to carry out the collection of the anti-dumping duty *via* Act 235. The relevant excerpts from the Hansard are reproduced:

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> Undang-undang Duti Timbal Balas dan Anti-Lambakan yang dicadangkan ini akan ditadbirkan oleh Kementerian Perdagangan Antarabangsa dan Industri. Walau bagaimanapun, undang-undang ini mempunyai hubungkait dengan Akta Kastam 1967 yang ditadbirkan oleh Kementerian Kewangan di mana Duti Timbal Balas dan Duti Lambakan yang akan dikenakan adalah merupakan Duti Kastam yang hanya boleh dikutip melalui perintah atau notis kastam di bawah Akta Kastam 1967 itu. Kementerian Kewangan sedang mengambil tindakan untuk memindah peruntukan yang bersesuaian dalam Akta Kastam 1967 bagi membolehkan pegawai-pegawai Jabatan Kastam memungut duti-duti berkenaan secara berkesan.

[28] Further, in the amendment to Customs Act 1967 which was captured in the House of Representatives Parliamentary Debates, 8th Parliament, 3rd Session on 21 December 1993 during the second reading of the Customs (Amendment) Bill 1993 at p. 12579 it was stated as follows:

> Akta Duti Timbal Balas dan Anti Lambakan 1993 telah pun diluluskan oleh Parlimen dan Jabatan Kastam dan Eksais DiRaja adalah dipertanggungjawabkan untuk memungut duti tersebut Sehubungan dengan itu, Fasal 2 bertujuan untuk memberi kuasa kepada pegawal kastam untuk memungut duti tersebut. Di bawah Fasal ini, takrif "customs duty" di bawah seksyen 2 Akta Kastam 1967 dipinda untuk mentakrifkan juga duti timbal balas dan duti anti-lambakan sebagai salah satu komponen customs duti.

[29] It can be understood from the above that the decision regarding the imposition of the anti-dumping duties is not made by the first respondent by the issuance of the Customs (Anti-Dumping Duties) Order 2020 [P.U. (A) 22/2020] because the Customs (Anti-Dumping Duties) Order 2020 [P.U.(A) 22/2020] is an administrative process undertaken by the first respondent pursuant to s. 11 of the Customs Act 1967. This is reflected in the Customs (Anti-Dumping Duties) Order 2020 [P.U.(A) 22/2020] where it states:

> **Countervailing And Anti-Dumping Duties Act 1993**
> **And Customs Act 1967**
> **Customs (Anti-Dumping Duties) Order 2020**
>
> In exercise of the powers conferred by section 25 of the Countervailing and Anti-Dumping Duties Act 1993 [Act 504] and **subsection 11(1) of the Customs Act 1967 [Act 235],** the Minister makes the following order.
>
> (emphasis added)

[30] It is therefore clear that the Customs (Anti-Dumping Duties) Order 2020 [P.U.(A) 22/2020] is an instrument issued by the first respondent for the purpose of collecting the anti-dumping duties and for enforcing the decision made by the fourth respondent and published in the Notice of Affirmative Final Determination [P.U.(B) 46/2020] pursuant to s. 25(1) and (4) of Act 504. As such, the actions by the second respondent in signing the Notice of Affirmative Final Determination on 15 January 2020 and the first

respondent signing the Customs (Anti-Dumping Duties) Order 2020 on 16 January 2020 are administrative actions for purposes of implementing the decision of the fourth respondent in imposing the anti-dumping duties. There is no procedural irregularity in regard to the issuance of the Notice of Affirmative Final Determination on 15 January 2020 and there is no abdication of responsibility by the first respondent.

The Second Issue: Breach Of Natural Justice

[31] The applicant apparently is unhappy with the role played by the Malaysian Steel Institute ("MSI"), an agency of MITI, who had assisted the fifth respondent in drafting the anti-dumping petition for a fee and that the fifth respondent as the petitioning producer is a paying member of MSI. It is alleged that on or around 30 September 2019, the fifth respondent donated RM250,000 to MSI to promote and develop the competitiveness, resilience and sustainability of the local iron and steel industry. The applicant stressed upon the fact that the anti-dumping petition then was investigated by the IA which is a department within MITI and both MSI and the fifth respondent reported to the second respondent being the MITI Minister who had made a recommendation to the first respondent. It is the applicant's contention that there exists a situation where MITI acts as complainant through its agent, MSI, an investigator through its department the IA and also as an adjudicator in making the decision to impose the anti-dumping duties. According to the applicant, "something is rotten in the state of Denmark" in the sense that the situation and entwined relationship of the parties give rise to, at the minimum, the irresistible perception that there exists a real danger of bias on the part of the respondents, especially the second respondent in that the respondents could have very likely regarded the fifth respondent's petition with favour. The applicant cited the English Court of Appeal case of *Hannam v. Bradford City Council* [1970] 1 WLR 937 where Widgery J had observed that "when one is used to working with other people in a group or on a committee, there must be built-in tendency to support the decision of that committee, although one tries to fight against it ..."

[32] The applicant added that at the material time, MSI was chaired by the MITI's Deputy Secretary General who had previously held the post as the head of the IA in MITI. In short, the applicant takes the position that the agent of MITI in the form of MSI should not be advising in the drafting of the petition.

[33] The real danger of bias is the test that has been adopted by the Malaysia courts in determining whether a decision is made impartially or otherwise. The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 had held that the test to determine the existence of bias is not to look at the matter through the eyes of a reasonable man but to enquire whether the

facts and circumstances from available evidence not necessarily available to an observer at the relevant time, affirmatively answer the test. In that case, Edgar Joseph Jr FCJ held:

> The conflict of judicial opinion appears to have been resolved by the House of Lords in *R v. Gough* [1993] AC 646 when the House applied 'the real danger' of bias test ... Lord Goff, speaking for the House, made it clear that this was the test to apply in all cases of apparent bias, whether concerned with justices or other members of inferior tribunals, or with jurors or with arbitrators.
>
> Explaining the 'real danger' of bias test, Lord Goff put it this way (at p 670 F):
>
> > Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard '(or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.
>
> Lord Goff went on to substitute 'the opinion of the Court' for Lord Denning's 'reasonable people' in *Lannon.* Here is what he said on this point:
>
> > *... Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.*
>
> The 'real danger' test favoured in *Gough* could be seen as a compromise between 'the reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress that the Court is contemplating a lower standard that 'likelihood' or 'probability of bias', that is to say, a 'real possibility of bias': see *Gough* at pp 668 C-D, 670E-F, per Lord Goff; p 671 B-C, per Lord Woolf.
>
> It is, also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v. Gough* per Lord Goff, at p 670D-E).
>
> *Having given careful consideration to the matter, we prefer the test of apparent bias given in Gough ('the real danger of bias' test) as this will avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias.*
>
> (emphasis added)

[34] It is therefore pertinent for this court to look into the facts and circumstances of the case through the averments of the respondents' deponents on this issue. The respondents in their respective affidavits have averred as follows:

(i) the MSI is an agency of MITI, the Deputy Secretary General of MITI sits as the Chairman of MSI;

(ii) MSI, a company limited by guarantee had been established to cooperate with MITI amongst others to promote and develop the competitiveness, resilience and sustainability of the Malaysian iron and steel industry;

(iii) whilst the Deputy Secretary General of MITI hold the post as the Chairman of MSI, the Deputy Secretary General was not involved in the investigation and preparation of the report by the IA and also in the consideration which was carried out by the second respondent in giving a recommendation to the first respondent for the purpose of preliminary determination and final determination;

(iv) no Senior Director of MITI sat in the Board of Directors' of MITI at the material time;

(v) whilst it is one of the functions of the MSI to provide advisory services on matters pertaining to trade remedies to its members, it is not within the knowledge of the IA, MITI and Ministry of Finance whether MSI assisted MSA in drafting of MSA's petition. The scope of the advisory services which had been given by the MSI with respect to trade remedies to its members is not within the IA's knowledge;

(vi) it is only within the second respondent's knowledge and not the IA that MSI is "funded with seed money from the Ministry of International Trade & Industry", even though the information had been published in the MSI's website as it is not one of the function and responsibility of the IA to monitor and be aware with respect to MSI's operation and development;

(vii) the IA has no connection with the fifth respondent and MSI. In investigating the petition which was received from the fifth respondent, the IA had acted in a *bona fide*, transparent, fair and independent manner. There has been no interference from any party throughout the investigation carried out by the IA with respect to the petition received from the fifth respondent and the findings by the IA was not influenced by any party;

(viii) the fifth respondent, individuals from MSI and Executive Officer of MIDA were not involved with any action, investigation, recommendation, finding or decision made by the respondents pursuant to Act 504;

(ix) there is nothing untoward of the two members of MSI's Board of Directors who are also directors of the petitioning producers as it is a norm for members of the Government agencies board of directors

to consist of individuals from the private and public sector which are closely linked with the agencies functions to ensure that the agency would be able to carry out its function effectively;

(x) however, it is not within the second respondent's knowledge that two members of MSI's Board of Directors are also directors of the petitioning producers and are paying members of MSI;

(xi) whilst there is a donation made to MSI by the fifth respondent, it is not within the knowledge of the second respondent the reason behind the donation made by the fifth respondent to MSI. In any event, the donation was never channelled for MITI's use and/or expenditure, the donation that was given by the fifth respondent to MSI did not influence and/or create any obligation on the part of the IA to act in a biased manner in acting and carrying out the investigation and on the part of the second respondent to act in a biased manner in making a recommendation to the first respondent for the purpose of preliminary determination and final determination;

(xii) at all material times, MSI which is chaired by the Deputy Secretary General of MITI is not answerable to the second respondent with respect to the management of MSI's finance;

(xiii) in making a recommendation to the first respondent for the purpose of making the preliminary determination and final determination, the second respondent was not influenced by any relationship between the fifth respondent and MSI; MSI and MITI. The second respondent had acted independently and fairly;

(xiv) the fifth respondent and MSI have had no relationship with the first respondent who had made the preliminary determination and final determination;

(xv) the relationship between the petitioning producers and MSI is irrelevant in the first respondent making a decision whether to impose anti-dumping duties or otherwise;

(xvi) in arriving at the affirmative preliminary determination and affirmative final determination the first respondent was not influenced by any party but was arrived at after perusing and considering the relevant documents; and

(xvii) in arriving at the decision on whether to impose anti-dumping duties, the first respondent only needs to give consideration to the recommendation made by the second respondent and is not constrained/bound to follow the recommendation of the second respondent.

[35] It must be borne in mind that the legal duty to carry out an anti-dumping investigation is cast on MITI alone. Hence, even if on the surface it looks as though MITI seems to be a judge in its own cause, the validity of the decision cannot be challenged merely on this ground alone. Further, the facts and circumstances of the case do not support the applicant's contention that there is a real danger of bias as the respondents have consistently maintained that they were unaware of MSI's involvement in the preparation of the petition. MSI was never mentioned in the petition and there is nothing in the petition which indicates MSI's involvement. In addition, the fifth respondent represented itself during the entire anti-dumping investigation and MSI was never involved, in its letter of offer to the fifth respondent, MSI expressly outlined its scope of responsibilities which states, amongst others, that MSI will not have any direct dealings with MITI and will not represent the fifth respondent in any discussion with MITI.

[36] It is clear for that matter that there is no averment that a representative from the first respondent sat in the MSI's Board of Directors and none of the MSI's Board of Directors was involved in the investigation process. Having regard to the circumstances it cannot be gainsaid that there is a real danger of bias on the part of the IA, the first and second respondents in exercising their functions under Act 504. The court cannot act on possibility or probability. Even where inference can be made, the inference must be based on evidence.

[37] The case *Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors* [2021] 2 CLJ 808; [2021] 3 MLJ 1 cited by the applicant can be distinguished from the present matter. In that case, the Datuk Bandar is a member of the Yayasan's Board of Trustees and the application for planning permission was made in the joint names of Yayasan and Memang Perkasa. The application was actually made by Memang Perkasa under a power of attorney granted by Yayasan. The Court of Appeal after looking at the chronological records of how the development order came to pass, the process and circumstances of the grant of the development order was facilitated, the details of the joint venture agreement ("JVA") and the involvement of the Datuk Bandar, found further evidence of the existence of a conflict of interest in addition to the findings of procedural irregularity. It is undeniable that the terms of the JVA, looked at as a whole, all point inexorably to the existence of a conflict of interest. The commercial interests of Yayasan under the JVA where the Datuk Bandar is a member of the Board of Trustees of Yayasan is sufficient to say that the test of conflict of interest has been met and tainted the development order granted by the Datuk Bandar.

[38] In the instant matter, none of the MSI's Board of Directors was involved in the investigation process. The recommendation was made by the second respondent and not the Deputy Secretary General of MITI and the decision was made by the first respondent. All the applicant was able to establish is the connection between MSI and the fifth respondent and the tenuous relationship between MSI and the MITI by virtue of the Deputy Secretary General of MITI holding the post as MSI's Chairman.

[39] In the case of *Hannam v. Bradford City Council* [1970] 1 WLR 937 relied on by the applicant, this court finds that the excerpts quoted by the applicant are taken out of context. In that case, the plaintiff became a physics teacher at a voluntary school maintained by the local education authority. Pursuant to the articles of government of the school the local education authority shall have the power to prohibit the dismissal of an assistant master without the consent of the authority. The plaintiff absented himself from his duties without leave and never returned to the school. The governors on 19 December 1967 terminated his employment by giving him due notice and later the staff subcommittee of the local education authority on 18 January 1968 resolved not to prohibit the plaintiff's dismissal by the governors. It must be observed that three members of that subcommittee, including the chairman, were governors of the school but had not been present at the governors' meeting on 19 December 1967. It was in that context that the court held as follows:

> ... when one is used to working with other people in a group or on a committee, there must be a built-in tendency to support the decision of that committee, even though one tries to fight against it, and this is so even though the chairman was not sitting on the occasion when the decision complained about was reached.

[40] Based on the facts and circumstances of the case, this court is satisfied that the anti-dumping duties were imposed after an objective investigation had been undertaken by the respondents and there is nothing before this court to show that the decision was made based on the fifth respondent's petition alone or that the first respondent was influenced by any party.

The Third Issue – Ultra Vires, Illegal And Unreasonable Decision As There Were Calculation Errors In Regards To The Anti-Dumping Duty

[41] Another aspect of breach of natural justice alleged by the applicant relates to the anti-dumping investigation specifically as to the calculation of the dumping margin. It is the applicant's contention that the IA refused to provide the detailed margin calculation sheet to them.

[42] An anti-dumping investigation involves the exercise of comparing the price at which the product under investigation is sold in the producing country (domestic price) with the price at which the said product is sold in the importing country (export price). Therefore, according to the applicant, the detailed dumping margin calculation sheet is material and essential document which goes to the root of the matter.

[43] To properly respond to the respondents' decision to impose anti-dumping duties at the rate of 3.62% on the applicant's export of rebar to Malaysia, the applicant stated that they have repeatedly requested the IA to provide them with the detailed dumping margin calculation sheet to which the IA is said to have refused and/or neglected to provide the applicant with. According to the applicant, in previous Malaysian anti-dumping investigations, the IA readily provided responding exporters with a detailed dumping margin calculation. Further, the applicant stated that in the original investigation of the present matter, the IA only provided them with the summarised information to which the applicant contends does not provide any way for them to ascertain if the IA conducted the "ordinary course of trade test" properly. Further in the absence of the detailed dumping margin calculation sheet, the applicant is said to be unable to ascertain the manner in which the IA selected the data, in particular when ascertaining the value of adjustment and determining export price.

[44] The first to fourth respondents had responded to the allegations as follows.

[45] Whilst there had been a request for the detailed dumping margin calculation sheet by the applicant, it is not an essential document to enable the applicant to respond and defend its interest as:

(i) Part D and Appendix I of the Preliminary Determination Report and Part D, Part E and Appendix I of the Notice of Essential Facts contain the methodology for the calculation which had been utilised in arriving at the dumping margin, the data which had been selected for the applicant's sales data and the basis adjustment was made in calculating the normal value and export price;

(ii) the normal value at ex-factory (after adjustment), the export price at FOB (before adjustment) and the export price at ex-factory (after adjustment) which had been used to calculate the dumping margin had been obtained from the applicant's domestic and export sales data which is supplied by the applicant;

(iii) the applicant is only required to extract the said data and insert the data in the formula prescribed by law to obtain the dumping margin calculation;

(iv) the detailed dumping margin calculation sheet sought by the applicant does not contain any basis for the inclusion of the sales data but only the amount that has been derived by the IA from the sales data provided by the company for the purpose of calculating the dumping margin;

(v) in this instant case, the applicant did not have any difficulty in calculating the dumping margin on their own based on the information in the Preliminary Determination Report;

(vi) in fact, the applicant had been able to give a detailed explanation/response which the applicant was of the view the IA should have considered and/or should not have considered. It is evident based on a perusal of the notice of essential facts and also the final determination reports that the issues raised by the applicant had been considered by the IA;

(vii) the IA during the investigation and in preparing the preliminary/final determination report no longer prepares the detailed dumping margin calculation sheet sought by the applicant. Thereby the IA had rejected the applicant's application for the detailed dumping margin calculation sheet; and

(viii) the IA has the discretion in the manner of preparing a report with respect to an anti-dumping investigation, in the instant case, the IA is of the view that all the material information which had been taken into account had been stated in the Preliminary Determination Report and Notice of Essential Facts and the Final Determination Report there is no necessity to prepare a detailed dumping margin calculation sheet.

[46] On this issue, it is the observation of this court that there are no provisions under Act 504 and P.U.(A) 233/1994 which requires the IA to prepare a detailed dumping margin calculation to be supplied to the applicant and/or insert the same in the Preliminary Determination Report and the Notice of Essential Facts and the Final Determination Report.

[47] The position had been explained in the report of the Panel-China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment From The European Union dated 26 February 2012 to which the applicant was informed by way of a letter dated 3 February 2020. Article 12.2.2 of the report stated that there is no requirement for all "essential facts" underlying dumping calculations, or for the calculations themselves to be included in the public notice.

[48] Reference is again made to the same report where the European Union claims that China acted inconsistently with Article 12.2.2 of the report by failing to make available the calculations and underlying data is used to determine the margin of dumping as such data and calculations constitute "relevant information" on the matter of fact and law and reasons which led to the imposition of definitive measures. The panel found that the calculations need not be included in the Article 12.2.2 public notice and agreed with the finding by the China – GOES panel which made the following finding at p. 126 of the report:

> Although the requirement to give public notice of "all relevant information on matters of fact and law" may appear wide enough to encompass the data and calculations used to determine the dumping margins, this requirement must be read in the light of the more particular obligation spelt out in Article 12.2.1 (iii), which is incorporated by reference into Article 12.2.2. In the Panel's view, it is significant that the text in Article 12.2.1 (iii) sets out in detail the information regarding dumping margins that must be included in a public notice or separate report, but omits any reference to them calculations or data. While Article 12.2.2 provides that its disclosure obligations apply "in particular" to the factors in Article 12.2.1 (iii) and to the reasons for acceptance or rejection of relevant arguments or claims, we acknowledge that this is not an exhaustive description of the "relevant information" that may be included in a public notice or separate report under Article 12.2.2. Nevertheless, some relevance must be attributed to the fact that the drafters of Article 12.2 specified with some particularity a list of the information required in the public notice or separate report and chose not to list the data and calculations used to arrive at a dumping margin, even though, on the United States' argument, this is "relevant information" that should be included in every public notice or separate report issued at the conclusion of an anti-dumping investigation. Therefore, on the text of Article 12.2.2, which by cross-reference includes the text of Article 12.2.1, it is difficult to conclude that there is an obligation to disclose the calculations and data underlying a dumping margin.

[49] The applicant had just highlighted Appendix I which contains the summary of the dumping margin calculation to support their contention that they are unable to ascertain the manner in which the IA had selected the data. However, this court finds in paras. 104 to 110 and paras. 139 to 148 of Section E of the Final Determination Report the explanation provided by the IA with respect to the methodology, data selection, ordinary course of trade, calculation of normal value and export price as well as the adjustment is taken into consideration by the IA in calculating the dumping margin are disclosed.

[50] It is of the considered view that there is sufficient information for the applicant to calculate the dumping margin without the calculation sheet at the preliminary determination stage. It is of the further considered view that Section D of the preliminary determination report, Section E of the notice of essential facts and Section E of the Final Determination Report are in accord with art. 12 of the WTO Anti-Dumping Agreement. Article 12 of the WTO Anti-Dumping Agreement stated:

> 12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, in

sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

12.2.1 A public notice of the imposition of provisional measures shall set forth, or otherwise make available through a separate report, sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular:

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

12.2.2 A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

[51] It must be added that the change position with respect to the adjustment for normal value and export price requested by the applicant had been clearly identified after the verification visit. In other words, from both the reports and notice, the differences as to the normal value and export price are adjusted after verified information. So, the essential facts under consideration that form the basis for the decision have been disclosed. This court finds that the applicant cannot be said to be put in a situation where it cannot understand clearly the data the IA had used and how these data or information was used to determine the anti-dumping margin. Apparently, the

IA had acted pursuant to sub-s. 17(1) of Act 504 which provides that the export price shall be the price actually paid or payable for the subject merchandise. There were invoices as proof of sales transaction between the applicant and DDT obtained by the IA from the applicant and as such the IA reliance on those sales transactions to be the basis of the export price cannot be said to be unreliable.

[52] The use of the selling price from the applicant to DDT by the IA to establish the export price is reasonable and valid even though the applicant and DDT are related trading companies as the IA in determining the export price had acted in accordance with s. 17(1) of Act 504 and there is no requirement for the export price to be constructed in accordance to s. 17(2) read together with s. 17(3) of Act 504 (by using the price at which the subject merchandise is first resold to an independent buyer (DDT to the Malaysian importer and for allowance to be made for all costs incurred between importation and resale) as the issue of unreliability of export price does not arise.

[53] It should be noted that the WTO Anti-Dumping Agreement, Act 504 and the subsidiary regulation does not explicitly describe that the export price shall be the price paid by the importer in the importing country. Section 17(1) of Act 504 merely provides that the export price shall be the price actually paid or payable for the subject merchandise. Reference is made to the Technical Information on Anti-Dumping on the WTO website *ie*, https://www.wto.org/english/tratop_e/adp_e/a_dp/info_e.htm where WTO recognises that export prices are based on the transaction price at which the foreign producer (DDT) sells the product to an importer (Malaysian importer) may not be appropriate for purposes of comparison. WTO acknowledges that the agreement requires that a fair comparison of the export price and the normal value be made whereby the prices being compared are those of sales made at the same level of trade, normally the ex-factory level and of sales made at as nearly as possible the same time.

[54] The position of the WTO is reproduced below:

> Determination of export price
>
> General rule
>
> The export price will normally be based on the transaction price at which the foreign producer sells the product to an importer in the importing country. However, as is the case with normal value, the Agreement recognizes that this transaction price may not be appropriate for purposes of comparison.
>
> Fair comparison of normal value and export price

Basic requirements

The Agreement requires that a fair comparison of the export price and the normal value be made. The basic requirements for a fair comparison are that the prices being compared are those of sales made at the same level of trade, normally the ex-factory level, and of sales made at as nearly as possible the same time.

(emphasis added)

[55] In determining the export price in a situation where an intermediary (DDT) is involved, guidance could be obtained from the Dumping And Subsidy Manual November 2018, Anti-Dumping Commission of the Australian Government where it is stated as follows:

Typically the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter. The export price will be the price received by that producer/exporter *ie*, the manufacturer. *Where an intermediary is involved the export price, for the purposes of calculating a dumping or subsidy margin, will be the price received by that exporter when selling to the intermediary (even if the intermediary is in the same country as the exporter).*

(emphasis added)

[56] This has been expressly acknowledged by the Appeal Board in the case of *United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan* WT/DS184/AB/R where it was held:

166. The text of Article 2.1 is, however, silent as to who the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the Anti-Dumping Agreement are satisfied, the identity of the seller of the "like product" is not a ground for precluding the use of a downstream sales transaction when calculating normal value. In short, we see no reason to read into Article 2.1 an additional condition that is not expressed.

(emphasis added)

[57] In the instant case, the applicant had in the Exporter's Questionnaire Response informed that the applicant sells the subject merchandise to DDT. The applicant had stated as follows:

D-1 General Information

1. Explain your company's channels of distribution to Malaysia, starting from the factory gate until the sale to your customers. Include a detailed flowchart indicating terms of sale and pricing to each class of customer (*eg*, producers, importers, distributors, wholesalers, retailers and end-users) including the average time frame within each step takes place to the related and unrelated customers. Explain the basis of categorisation of customers.

> ANSWER: As noted before, all export activities including Malaysian sales are carried out through DDT. **DDC sells the subject merchandise to DDT** and DDT performs a back-to-back resale to the unaffiliated Malaysian customers or to traders located in third countries which eventually ship the PUI into Malaysia. Accordingly there are two different distribution channels; one is the sales to final unaffiliated Malaysian end-users and the other is ... Although there are different types of customer categories and distribution channels, the sales process or pricing does not change based on these different customer categories and channels of distribution. DDT does not have any export sale to any of its related companies. In the normal course of business, **DDC sells the PUI to DDT on an ex-works or FOB basis and DDT incurs the rest of the movement expense.** (emphasis added)

[58] In arriving at the export price of Product Under Investigation, the IA had considered the sales transaction between the applicant to DDT which the IA had obtained from the applicant by way of a letter dated 1 August 2019.

[59] The applicant had by way of reply to the Supplemental Questionnaire For Foreign Producers And Exporters To Malaysia On The Application Of Anti-Dumping Duties identified their invoices to each DDT's sales to Malaysian customers. In other words, the applicant is able to identify and supplement the exact same sales transactions between them to DDT and DDT to Malaysian customers.

[60] Based on the aforementioned evidence and as stated earlier, the IA had acted in accordance with sub-s. 17(1) of Act 504 in identifying the export price. The sales transaction between the applicant and DDT is substantiated with invoices as proof of sales thereby satisfying the IA that the export price based on the sales transaction between the applicant to DDT is reliable. Hence, the application of s. 17(2) of Act 504 is precluded. Sub-sections 17(1) and (2) of Act 504 state:

> Export price
>
> 17(1) The export price shall be the price actually paid or payable for the subject merchandise.
>
> (2) In cases where there is no export price or where it appears that the export price is unreliable because the exporter and the importer or a third party are related, or that there is a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer, or if the subject merchandise is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis.

[61] It can be clearly understood that export price need not be constructed in light of the invoices between the applicant to DDT. Whilst s. 17 of Act 504 requires the export price shall be the price actually paid or payable for the subject merchandise, it must be read together with s. 18 of Act 504 which requires:

(i) fair comparison to be made between the normal price and the export price; and

(ii) the comparison shall be made at the same level of trade *ie*, ex-factory level, and in respect of sales made at as nearly as possible the same time.

This essentially means the normal value and the export price that had been identified by the IA must be compared fairly with each other.

[62] In the instant case should the IA use the price from DDT to Malaysian importers as the export price, the IA will not be able to arrive at the accurate ex-factory export price as there were sales transactions between the applicant to DDT (at a different level of trade) before the product was sold to be used to verify the originality of this document *via* eFILING portal Malaysia by DDT. If the price between DDT to Malaysian customers was used, the IA will still have to take into consideration the sales transaction between the applicant to DDT to arrive at the ex-factory export price. The IA's approach in calculating the export price and thereafter the ex-factory export price is supported by the finding of the Appeal Board in the case of *United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan* WT/DS184/AB/R where it was held:

> 170. Our reading of Article 2.1 of the Anti-Dumping Agreement is not altered by the fact that, under Article 6.10 of that Agreement, the investigating authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned". The downstream sales prices which we believe may be used to calculate normal value do enable a margin of dumping to be calculated for the "like product" produced by a particular exporter. The downstream sale used involves an affiliate of the exporter concerned and the sale of the "like product" produced by that exporter. By making the allowances required under Article 2.4 of the Anti-Dumping Agreement, the investigating authorities should, in effect, arrive at a price which corresponds to the "ex-factory" price of the "like product" for the specific exporter concerned, as required by that provision.

[63] In the instant case, the IA had determined the applicant as the producer/exporter of the product concerned and was satisfied that the information provided by the applicant on its sales transaction to DDT is reliable to be used as export price.

[64] Since the IA had correctly selected the sales transaction between the applicant to DDT to arrive at the export price, there is no issue with respect to refusal to use the contract date as a basis to determine the export price as there are no contracts entered between the applicant and DDT since there are only invoices between the applicant and DDT. The applicant accounting information in the applicant's accounting system is based on the invoices between the applicant and DDT which were verified during the verification visit and captured in the signed uplifted documents checklist that:

> b) The IA takes note that the company has requested for date of sales to be based on the sales of contract due to the material terms of sales are agreed in the sales contract. However, the company recognized the sales based on the date of shipment as per recorded in the company accounting system due to the Turkish Government Tax Law. Credit cost of export sales are also based in the difference of days from shipment to the date of payment receipt.

[65] It is of the considered view that the applicant's contention that there is a domino effect due to the alleged error by the IA in selecting the preliminary data pool to determine the export price is a non-starter.

[66] This court further finds that the IA had provided the findings on key issues in a timely manner. The IA had at all material times divulged that it is satisfied that the determination of the dumping margin should be based on the date of the invoice as the date that established the material terms or the actual details of the sales in accordance with art. 2.4.1 of the WTO Anti-Dumping Agreement. The respondents by way of the Notice of Essential Facts had informed the applicant the essential facts under consideration that form the basis for the decision whether to apply definitive measures in accordance with s. 25(2) of Act 504 which states:

> 25(2) The Government shall, before making a final determination, inform all interested parties of the essential facts under consideration that form the basis for the decision whether to apply definitive measure.

[67] The applicant therefore cannot be said to have been deprived of the right to defend their interest before the issuance of the Final Determination Report. There cannot be a violation of art. 6.4 of the WTO Anti-Dumping Agreement as well. In the *European Communities-Definitive Anti-Dumping Measures On Certain Iron Or Steel Fasteners From China* WT/DS397/AB/RW, the appellate body in agreeing with the panel stated as follows:

> 5.121. As the Panel found in its analysis of China's claims under Article 2.4 of the Anti-Dumping Agreement and as discussed below in the context of the European Union's appeal of the Panel's findings under that provision, the company-specific disclosures relied on by the European Union did not disclose all of the data that the Chinese producers were requesting as regards Pooja Forge's products. Indeed, in its analysis of China's claim under Article 6.4, the Panel noted that "the European Union [did] not contest that the Chinese producers did request to see the information at issue and that it was not provided to them. Thus, because the Commission did not provide an opportunity for the Chinese producers to see "all" information that was "relevant to the presentation of their cases", the question of whether "timely opportunities" were provided, within the meaning of Article 6.4, was, in our view, a moot point that did not arise for consideration.

> 5.122. We further consider that the issue of whether "timely opportunities", within the meaning of Article 6.4, have been provided to interested parties to see information that falls within the scope of that provision must be determined on a case-by-case basis. Article 6.4 requires investigating authorities, "whenever practicable", to provide interested parties "timely opportunities" to see "all information" that is relevant to the presentation of their cases, that is not confidential for the purposes of Article 6.5, and that is used by the authority in the sense that it relates to a required step in the anti-dumping investigation. Thus, the obligation in Article 6.4 applies to a broad range of information that may relate to several required steps in an anti-dumping investigation. Hence, whether "timely opportunities" have been provided to see information for the purposes of Article 6.4 must be considered in the light of the circumstances of each case, taking into account the specific information at issue, the step of the investigation to which such information relates, the practicability of disclosure at certain points of the investigation *vis-a-vis* other points, and the stage of the investigation at which interested parties have made a request to see the information at issue. Thus, we disagree with the proposition that providing three weeks to exporters to comment on information within the scope of the obligation under Article 6.4 is insufficient, in all cases, to satisfy the requirement to provide "timely opportunities" to see such information.

[68] Therefore, there is no issue of whether "timely opportunities" within the meaning of art. 6.4 of the WTO Anti-Dumping Agreement have been provided to interested parties to see information, as the IA had throughout maintained that in calculating the dumping margin the invoice date would be used and not the contract date.

[69] Hence there is no breach of arts. 6.2 and 6.4 of the WTO Anti-Dumping Agreement as alleged by the applicant.

[70] This court will not consider the applicant's contention that the amount of dumping duties imposed had exceeded the actual dumping margin as the allegation was never raised by the applicant throughout the investigation and in the present application.

[71] Further, it is the applicant's stand in their affidavit that there must be a verification report and any express rejection of any information must be done by way of the verification report. The applicant's contention that in the absence of any express rejection, the IA must use the applicant's verified data in making any finding, decision and/or recommendation.

[72] Again, this court finds that there is no requirement under the law to prepare a verification report for the purpose of verifying the information that has been taken into account or that had not been accepted. It is sufficient under the law for the information that had been accepted and the information that had been rejected to be stated by way of Notice of Essential Facts. The

respondents *via* the Notice of Essential Facts had provided justification for not taking into account certain information that had been submitted by the applicant:

(i) price of rebar between DDT and Malaysian importers;

(ii) sales contract date between DDT and Malaysian importers; and

(iii) adjustment for duty drawback.

[73] It is the observation of this court that the IA had complied with the requirement as enunciated in the case of *BX Steel POSCO Cold Rolled Sheet Co Ltd v. Minister Of Finance & Ors; FIW Steel Sdn Bhd (Intervener)* [2020] 1 LNS 587; [2021] 7 MLJ 604 where the evidence or information which was not accepted by the IA had been informed by the IA to the applicant by way of Notice of Essential Facts and the applicant had been given the opportunity to file Comment to the Notice of Essential Facts before the IA produced with the Final Determination Report. In *BX Steel POSCO Cold Rolled Sheet Co Ltd v. Minister Of Finance & Ors; FIW Steel Sdn Bhd (Intervener)* [2020] 1 LNS 587; [2021] 7 MLJ 604, it was stated:

> [29] Further, the information about the compensatory agreement and other related fact which has been verified must be taken into account by the IA in consistent with Paragraph 3 and 6 of Annex II: Best Information Available In Terms of Paragraph 8 of Article 6 of the World Trade Organization Anti-Dumping Agreement, which are as follows:
>
> (ii) Paragraph 6
>
> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

[74] In the case of *European Union – Anti-Dumping Measures On Imports of Certain Fatty Alcohols From Indonesia* WT/DS442/R relied on by the applicant, it had also been clearly held that in order to satisfy the disclosure obligation, the IA may do so in two manner. One of which is to include the result of the verification in the disclosure of essential facts provided for under art. 6.9 WTO. The IA is also not required to address each argument or each piece of evidence presented by the applicant during the verification, prepare minutes of the verification or to prepare lengthy explanations and descriptions on aspects of the verification or to draft a document setting out the verification team's evaluation of the evidence and explanations that DDT provided on the spot. At the risk of repetition, in the instant case, the IA had stated in the Notice of Essential Facts on the adjustments accepted or rejected

and what was observed throughout the verification visit, in return the applicant could defend itself before the final determination was produced. As such this court finds that there has been no breach of natural justice as there is no requirement for the detailed dumping margin calculation sheet to be supplied to the applicant.

The Fourth Issue: Irrational And Unreasonable Decision As The IA's Findings On Injury And Causal Link Do Not Support Or Justify The Decision Reached

[75] It is of the considered view that there cannot be any irrationality in the injury and causal link analysis done by the IA.

[76] The respondents have divulged that during the anti-dumping investigation, the IA's finding on injury and causal link was not challenged by the applicant and was only raised specifically by the Minister of Trade, Republic of Turkey, the TSEA and other companies. No application was made to the court by any of these companies to review the findings of injury. As such the applicant cannot by way of this judicial review application raise this issue of injury and causal link findings which they did not address during the anti-dumping investigation.

[77] In this instant application, the applicant is challenging the IA's finding on injury and causal link specifically on the finding made on price suppression and profitability.

[78] By virtue of reg. 20 and reg. 21 of P.U.(A) 233/1994 determination on injury and causation is not confined to one but is subject to various criteria. Pursuant to reg. 20 of P.U.(A) 233/1994 the determination is as follows:

> (1) In determining the injury to the domestic industry from subsidized or dumped imports for the purposes of sections 7A and 22A of the Act, the Government shall evaluate all relevant economic factors and indices having a bearing on the state of the industry.
>
> (2) The factors and indices referred to in subregulation (1) shall include:
>
> (a) actual and potential decline in output, sales, market share, profits, productivity, return on investments or utilization of capacity;
>
> (b) factors affecting domestic prices;
>
> (ba) in relation to section 22A of the Act, the margin of dumping; and
>
> (c) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.
>
> (3) The factors and indices mentioned in subregulation (2) shall not be exhaustive nor shall one or several of such factors or indices be necessarily conclusive.

[79] Pursuant to reg. 21 of P.U.(A) 233/1994, the determination is as follows:

> (1) In determining whether the injury to the domestic industry is caused by the subject merchandise through the effects of subsidy or dumping, the Government shall consider, among other factors:
>
> (a) in relation to the volume of the subsidized or dumped imports, whether there has been a significant increase in subsidized or dumped imports, either in absolute terms or relative to production or consumption in Malaysia; and
>
> (b) in relation to the effect of the subsidized or dumped imports on prices:
>
> (i) whether there has been a significant price undercutting by the subsidized or dumped imports as compared with the price of a like product of Malaysia; or
>
> (ii) whether the effect of the subsidized or dumped imports is otherwise to depress prices to a significant degree or to prevent price increase, that otherwise would have occurred, to a significant degree.
>
> (1A) The factors referred to in subregulation (1) shall not be exhaustive nor shall one or several of such factors be necessarily conclusive ...

[80] The applicant had referred to the authoritative text of *Max Planck Commentaries on World Trade Law – WTO Trade Remedies,* Max Planck Institute for Comparative Public Law and International Law, 2008 at p. 62 where the followings are stated:

> But the panel found and the Appellant Body affirmed that the favourable financial and operating trends (profits, return on investment, production & capacity utilisation) trumped whatever adverse price trends might have been occurring.

[81] However, this court observes that the respondents had found that there was material injury amongst others, with respect to profitability, return of investment, production and capacity utilisation in Part F: Material Injury of the Final Determination Report at pp. 774 to 789 and reproduced herein:

> Conclusion on Material Injury
>
> 190. The IA concluded that the Domestic Industry suffered material injuries in terms of:
>
> i. Volume Effect
>
> Import Volume
>
> ii. Price Effect
>
> Price undercutting; and
>
> Price Suppression

iii. Profitability Effect

Profitability

Cash flow

Production and capacity utilization

Ability to raise capital

Return on Investment; and

Return on Total Asset

[82] It is dear that in the instant case, the domestic industry had suffered material injuries. The applicant's challenge towards the findings of "price suppression" and "profitability" does not negate the findings of the IA with respect to material injuries suffered by the domestic industry as the other factors still stand unchallenged specifically:

(i) volume effect – import volume;

(ii) price effect – price undercutting; and

(iii) profitability effect – cash flow, production and capacity utilisation, ability to raise capital, return of investment and return of total asset.

[83] Further, it is of the considered view that the finding of the IA with respect to price suppression cannot be said to be erroneous. It has been explained that the information in Table 10: Price Suppression in the Final Determination Report is based on indexing (horizontal analysis) for the purpose of protecting the information with respect to average sales price and cost to make and sell (CTMS) per tonne which is used by the petitioning producers. After having scrutinised the average selling price and also CTMS per tonne, the IA found the domestic industry had to sell the subject merchandise below CTMS during the period of investigation in order to compete with the low selling price of the subject merchandise from the alleged countries. It has been averred by the respondents that in analysing injury and causal link, profitability of the petitioning producer is merely one of the criteria which is taken into account in determining whether there exist material injury and causal link. The IA had carried out the injury analysis as reflected in Part F: Material Injury in the Final Determination Report before a finding is made on the injury and causal link. The applicant should not only take into consideration one factor *ie*, the profitability of the petitioning producer to rebut the finding of material injury and causal link as it is not in accordance with reg. 21 of P.U.(A) 233/1994. It is of the considered view that the findings in relation to the causal link by the IA with respect to the dumping which resulted in the petitioning producers to suffer material injury is reasonable and not in contradiction with the data submitted by the petitioning producers.

[84] The applicant further contends that the petitioning producer's profit increased seven-fold at the same time when the volume of imported rebar from the alleged countries increased. This court finds that such contention is erroneous as the applicant had considered the information from different years (year one and year two) instead of during the period of investigation. The injury analysis by the IA relied on by the first respondent is in accordance with art. 3.4 of the WTO Anti-Dumping Agreement which stipulates as follows:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

[85] It is of the considered view that there is no irrationality as the Government had found that the dumping had resulted in the domestic industry to suffer material injury.

Conclusion

[86] Premised on the above, this court finds that there is nothing irrational or illegal in the decision of the respondents. When all the process taken in the decision making is in accordance with law, it does not warrant interference of the court.

[87] The instant application was therefore dismissed with costs to the respondents.